EDITOR'S NOTE

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DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

88 - 5890

OCTOBER TERM, 1988

ORIGINAL

In re, JESSIE D. MCDONALD,

PETITIONER.

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Criminal Court No. B-317

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes the Petitioner, Jessie D. McDonald, pro se and moves this Court, pursuant to Rules 43, and 46 of the Rules of the Supreme Court of the United States, for leave to file the attached Petition for Writ of Habeas Corpus, in forma pauperis, on grounds, owing to my poverty, I am unable to pay the necessary fee's and costs for filing and for other reasons as set out in the accompanying affidavit.

This being the 12th., day of September, 1988.

Respectfully submitted,

Jessie D. McDonald

JESSIE D. MCDONALD, Pro se
P.O. Box 5724
2134-14th. Ave. No.
Nashville, Tenn. 37208
(615) 256-3434

RECEIVED
SEP 19 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JESSIE D. MCDONALD

Petitioner

v.

THE STATE OF TENNESSEE

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, JESSIE D. MCDONALD being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes X No ____

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   Approx. $300.00 - Self Employed

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.

   N/A

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

   Yes ____ No X

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

   N/A

3. Do you own any cash or checking or savings account? Yes X No ____

   a. If the answer is yes, state the total value of the items owned. Less than $25.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No X

   a. If the answer is yes, describe the property and state its approximate value.

   N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   Myself

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Jessie D. McDonald

Subscribed and sworn to before me this 12th. day of September, 1988

Susie P. Bartell
Notary

My commission expires May 8th., 1991

DOCKET NO.____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

In re, JESSIE D. MCDONALD,

Petitioner.

Criminal Court No. B-317

PETITION FOR WRIT OF HABEAS CORPUS

The Petitioner, Jessie D. McDonald, pro se, petitions this Court to issue a writ of habeas corpus; directed to the State of Tennessee, and shows as follows:

1. JURISDICTION

Jurisdiction to grant the writ of habeas corpus sought by petitioner herein, is conferred on this Court by the provisions of Section 2241(a), Title 28, United States Codes, and Rule 27.3(a),(b) of the Rules of this Court.

2. QUESTIONS PRESENTED FOR REVIEW

1. Whether an adequate remedy is available to petitioner in a lower federal court, since the petitioner exhausted his state remedies by a direct appeal, and the sentence has long since expired ?

2. Whether the petitioner is required to pursue the state's habeas corpus procedure, since the lower state court's do not have jurisdiction to reverse a judgment from the Tennessee Supreme Court ?

3. Whether this Court should exercise its discretion to grant the writ, where the petitioner has no other remedy available to him ?

QUESTIONS PRESENTED Continue

4. Whether grounds exist for concluding that the petitioner is unlawfully restrained of his liberties, when the proof at the trial showed that there had never been a criminal violation of the statute used to prosecute the petitioner ?

5. Whether the conviction on the petitioner's record should be expunged, since there has not been a criminal offense committed, within the meaning of the statute used for prosecution, and he was convicted of a crime, not charged in the indictment ?

3. CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution:

> " No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury;... nor be deprived of life, liberty, or property, without due process of law.

Fourteenth Amendment to the United States Constitution:

> " All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. STATEMENT OF THE CASE

1. This petition is filed pursuant to the authority to issue a writ of habeas corpus vested in this Court by the provisions of Section 2241(a), Title 28, United States Codes, and Rule 27.3(a),(b) of the Rules of this Court, to obtain an order to set aside the conviction, to restore his lawful liberties.

2. Petitioner was ordered committed to the warden of the Tennessee State Penitentiary, at Nashville, by the Honorable, Allen R. Cornelius, Jr., State judge for Division III, Criminal Court for Davidson County, at Nashville, Tennessee, by order dated, near May 6th., 1976, in Case No. B-317, after the case was remanded to the trial court, by order of

the Tennessee Supreme Court. A copy of the trial court's order is not available to be attached to the petition.

3. Petitioner states that he was deprived of his constitutional rights in the course of the trial resulting in his conviction aforesaid, in that he was convicted of a crime, not charged in the indictment, after being brought to trial, under an indictment that failed to allege a criminal violation, where there was no property brought before the trial court, valued at a sum over $100.00, as required by Section 39-1901, T.C.A., which the prosecution was based on.

4. The petitioner has made several applications to the district court, in the course of thirteen (13) years, which were denied and affirmed by the Sixth Circuit, while he was in custody serving the sentence. However in the instant case, the petitioner has not applied to the district court, because he is no longer confined and the sentence has long since expired.

5. The petitioner has exhausted his state remedies, by direct appeal, to the Tennessee Court of Criminal Appeals, where the conviction was reversed, but reinstated by the Tennessee Supreme Court, and the lower courts lack jurisdiction to reverse the judgment of the Tennessee Supreme Court.

6. Copies of the Opinion from the Court of Criminal Appeals and the printed judgment from the Tennessee Supreme Court, are attached hereto, to give the Court an understanding of the instant petition.

7. The proof at the trial showed that, the "title", that was alleged in the indictment, had no monetary value whatsoever, unless the automobile and title was obtained at the same time, and possession of both, resulted from the false pretense, supported by the testimony of Mr. Butler, a representative of the Tennessee Department of Revenue, who stated that it was his department that was responsible for issuing the titles. The proof at the trial further showed that the petitioner obtained possession of the 1972 Ford,LTD automobile at issue, under a valid contractual agreement, nearly six months prior to the date that was alleged in the indictment. The petitioner was never charged with providing false information, to obtain the credit to purchase the automobile at issue.

5. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The petitioner's constitutional right to due process of law, under the Fifth Amendment to the United States Constitution had been violated, in the trial proceedings, where the jury based its verdict on the property being the "1972 Ford, LTD, automobile", when the indictment alleged the property to be a "title", to the 1972 Ford, LTD, automobile, which was the reasons why the Tennessee Court of Criminal Appeals reversed the conviction and set aside the three year sentence.

However, when the Tennessee Supreme Court granted certiorari, to render a judicial interpretation on Section 39-1901, T.C.A., when there was no cross-petition filed with the clerk, the judgment of the state supreme court, deprived the petitioner of the opportunity to prevail on the constitutional violations, where he was convicted of a crime, not charged in the indictment.

In the instant case, the petitioner was anticipating further proceedings being conducted in the trial court, in compliance with the opinion entered by the Court of Criminal Appeals, on May 13th., 1975, BUT , the final judgment of the state supreme court prevented further proceedings in the trial court, and the outcome of the matter was final, and the lower courts are without powers to change or otherwise alter, and therefore, denied the right to prevail on his constitutional violations. Under such circumstances, this Court has granted habeas corpus relief. Cox Broadcasting Corp. v. Cohn, Ga., 1975, 95 S.Ct. 1029, 420 U.S. 469, 43 L.Ed. 2d 328, on remand, 214 S.E. 2d 530, 234 Ga. 67. It is clear that the State of Tennessee has waived the right to retry the petitioner, by the fact, the sentence has long since expired, and a period of thirteen years has lapsed. An application for writ of habeas corpus, if presented after exhaustion of state remedies, should be made directly to U.S. Supreme Court. In re, Miller, C.C.A., 1942, 126 F.2d 826, Cert Denied 62 S.Ct. 1107, 316 U.S. 677, 86 L.Ed. 1751, Reh. den. 62 S.Ct. 1307, 316 U.S. 713, 86 L.Ed.1778; Kramer v. State of Nevada, C.C.A., Nev.,1941, 122 F.2d 417.

Further, it is clear that the Tennessee Court of Criminal Appeals put the State of Tennessee on Notice, to proceed further in a manner not inconsistent with its opinion, as stated in the May 13th.,1975 judgment, which clearly stated that there had been a violation of Fifth Amendment to the United States Constitution, by the fact, the petitioner's conviction was based on a charge and property that was not specified and stated in the indictment. A time period of over thirteen years has since lapsed, and there has been no further proceedings to indict the petitioner on the charge convicted of, nor a trial held on the indictment that was rendered by the grand jury. Under such circumstances, it has been held by the United States Court of Appeals for the Sixth Circuit that, a conditional grant of a writ of habeas corpus required the petitioner's release from custody if new proceedings were not commenced by the state within the prescribed time period. Fisher v. Rose, 757 F.2d 789 (6th. Cir.,1985).

REASONS FOR NOT MAKING APPLICATION TO DISTRICT COURT

The petitioner states that, the trial court lacked subject matter jurisdiction, as well as jurisdiction over the persons of the petitioner since there has not been a criminal offense committed, within the meaning of the state statute, Section 39-1901,T.C.A., which was the basis for the prosecution, to justify the district court having the powers to entertain a petition for writ of habeas corpus.

The petitioner has never been indicted, as required by the Fifth Amendment to the United States Constitution, on the charged which the jury based its conviction. Further, the indictment that was used to initiate the trial..,do not allege a criminal offense, within the meaning of Section 39-1901,T.C.A., which alleges a 'title', to an automobile to be the property, when the proof at the trial, showed that the title had no monetary value whatsoever.

Therefore, under such circumstances, there is the presence of exceptional circumstances, warranting the exercise of the Court's discretionary powers and adequate relief cannot be had in any other form or from any other court.

6. CONCLUSION

WHEREFORE, the petitioner pray this Court to correct the judgment of the Tennessee Supreme Court, by including that of the Court of Criminal Appeals and set aside the conviction and three years sentence; direct the State of Tennessee to expunge the said conviction, from all public records; and all other and further relief the court deems proper.

Respectfully submitted,

Jessie D. McDonald

JESSIE D. MCDONALD, Pro se
P.O. Box 5724
2134-14th. Ave. No.
Nashville, Tenn. 37208
(615) 256-3434

VERIFICATION

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

I, Jessie D. McDonald, being first duly sworn , depose and says that, I am the petitioner; and that the information contained in the above petition is true and correct, to the best of my knowledge and belief.

Jessie D. McDonald
JESSIE D. MCDONALD

Subscribed and sworn to before me on this 29th., day of September, 1988.

Jessie P. Barbee
Notary Public

My Commission Expires: 5/8/91

IN THE COURT OF CRIMINAL APPEALS, NASHVILLE

JESSIE D. McDONALD,
Plaintiff in Error

vs.

STATE OF TENNESSEE,
Defendant in Error

Davidson County
No. B-317 Below

Offense:
Obtaining Property by False Pretenses.

Reversed and Remanded.

J U D G M E N T

Came the plaintiff in error, Jessie D. McDonald, representing himself, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Davidson County; and upon consideration thereof, this Court is of opinion that there is reversible error on the record in that the plaintiff in error was convicted of a crime not charged in the indictment.

It is, therefore, ordered and adjudged by this Court that the judgment of the Court below is reversed, the verdict of the jury set aside, and the cause remanded to the Criminal Court of Davidson County for further proceedings not inconsistent with the Court's opinion, a certified copy of which will accompany the procedendo on the remand, and for the collection of the costs of the Court below; for all of which, let procedendo issue.

Plaintiff in error is allowed to remain on original bond.

(1)

The State of Tennessee will pay the costs of the appeal, which will be certified to the proper officer of the State for payment in the manner provided by law.

The Clerk of this Court will furnish duly certified copies of this judgment to the Sheriff of Davidson County and to the Warden of the State Penitentiary. 5/13/75 .

(O'Brien, J., Dissenting)

Office of CLERK OF THE COURT OF CRIMINAL APPEALS
FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, RAMSEY LEATHERS, Clerk of said Court, do hereby certify that the foregoing is a true, erfect, and complete copy of the JUDGMENT *f said Court, pronounced at its February term, 19*75*, in case of* JESSIE D. McDONALD *against* STATE OF TENNESSEE *s appears of record now on file in my office.*

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 13th *day of* May, *19*75

Ramsey Leathers, *Clerk*

By Margaret M. Tinsley, *Deputy Clerk*

Procedendo
c: Sheriff
Warden
Cost Bill
Mr. McDonald

(2)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

NASHVILLE, SEPTEMBER 1974 TERM

FILED
MAY 13 1975
RAMSEY LEATHERS
CLERK
COURT OF CRIMINAL APPEALS

JESSIE D. McDONALD Plaintiff in Error v. STATE OF TENNESSEE Defendant in Error	No. B-317 Davidson County Honorable Allen R. Cornelius, Jr. Judge (Obtaining Property by False Pretenses)

For Plaintiff in Error:

Jessie D. McDonald, Pro Se
Nashville, Tennessee

For Defendant in Error:

Milton P. Rice
Attorney General
of Tennessee

William C. Koch, Jr.
Assistant Attorney General
Nashville, Tennessee

Robert H. Schwartz
Assistant District
Attorney General
Nashville, Tennessee

OPINION FILED: MAY 13 1975

REVERSED AND REMANDED

W. Wayne Oliver
Judge

(3)

O P I N I O N

The defendant was tried and convicted under the third count of the indictment. In essence that count charges that, with the intent to defraud a named credit union (from whom he borrowed money to buy a car), he obtained from the county court clerk a clear and unencumbered title to a $3150 Ford LTD automobile upon which the credit union had a lien, by falsely and fraudulently representing to the county court clerk that the credit union had released its lien and the car was unencumbered "with the fraudulent and felonious intent to deprive (the credit union) of its personal property and thereby caused (the county court clerk) to rely on said false and fraudulent representation and to deliver said unincumbered title to said automobile to the said defendant, . . ." (Emphasis supplied).

Thus, that count of the indictment does not charge that the defendant made any false representation to the credit union which owned the lien and was the victim, nor does it charge that the credit union relied upon any representation by the defendant. Instead, the indictment charges that the false and fraudulent representation was made to the county court clerk and that he relied on it and issued to the defendant an unencumbered title to the automobile. So, the question immediately arises whether the third count of the indictment charges a violation of TCA §39-1901, upon which this prosecution is based.

The trial judge read that statute to the jury, and stated the elements essential to constitute a violation of it exactly as they are set forth in Beck v. State, 203 Tenn. 671,

675, 315 S.W.2d 254 wherein the Court said: "Those elements are (1) the pretense, (2) the falsity of same, (3) the felonious and fraudulent intent, (4) the description of the property, and (5) the reliance of the victim upon the representations." (Emphasis supplied). In Beck, the prosecutor was bilked of $7,000 in money which he turned over to the defendants upon their false and fraudulent representation that they would arrange for him to purchase a large quantity of whiskey which the sheriff had confiscated and which the court had ordered sold. Thus, the fraudulent representation was made directly and personally to the owner of the money, he was the victim and turned his money over to them in reliance upon what they said.

In Mullican v. State, 210 Tenn. 505, 360 S.W.2d 35, it is emphasized that the person claiming to have been injured by the defendant's false and fraudulent representations must have parted with his property in reliance thereon, that by his false and fraudulent pretenses the defendant induced the party sought to be wronged to part with his property; and that the statute is not violated if the person claiming to have been defrauded parts with his property in reliance on the advice of others and not on the defendant's representations.

After stating the essential ingredients necessary to constitute a violation of TCA §39-1901, as above noted, the trial court went on to say to the jury:

> ". . . and the obtaining of the goods or money by false pretense and with an intent to defraud; and if the false pretense created the credit, it is within the statute.
>
> "You will note from the reading of Section 39-1901 of the Code above mentioned, that the law prohibits the obtaining of property by means of false pretense. Likewise, you will note the same law prohibits the obtaining of possession, intending at the time of receiving the property to feloniously steal the same. It is the State's theory that the

defendant had this intention and that he further demonstrated this intention at a subsequent date by obtaining a clear and unincumbered title to a 1972 Ford LTD automobile. Of course, it is for you, the Jury, to determine what the intention of the defendant was at the time of obtaining possession of the title to a 1972 Ford LTD automobile, and it is for you to determine, if in fact, the State has proved that this defendant did in fact, obtain the title to a 1972 Ford LTD automobil and if this fact sheds any light upon your determination of the issue of guilt in the initial obtaining possession of said property." (Emphasis supplied).

Upon this record there can be no doubt that the trial court was confused as to whether the defendant was charged with obtaining credit by false pretenses and as to whether the credit union's "property" mentioned in the indictment referred to the automobile. It is likewise clear that the jury also considered that the "property" involved was the automobile, for when they reported to the court after deliberation that they found the defendant guilty of receiving property by means of false pretenses and that they found the value of the property to be more than $100, there was a colloquy between the trial judge and the jury foreman in which the latter inquired if the jury had authority to fix the sentence at less than three years. The court replied that they could not do so if they found the value of the property over $100, and the foreman replied, "A '72 LTD is valued over a hundred dollars."

At any rate, it is unquestionable that the third count of the indictment upon which the defendant was convicted does not charge a violation of TCA §39-1901. He did not obtain the automobile from the credit union, and there is no charge or proof that he feloniously and fraudulently made any false pretense or representation to the credit union in obtaining the loan. Upon the face of this indictment and upon the record, his only false and fraudulent representation was made to the county court clerk, and that official believed and relied upon his false statement

that the credit union had released its lien on the car and issued to him a clear title to it.

Whatever crime the defendant committed, it was not obtaining property by false pretenses in violation of that statute. He was, therefore, convicted of a crime not charged in the indictment. Such a conviction cannot stand. Criminal prosecutions cannot be sustained by intendment, but everything necessary to constitute the offense must be charged. Church v. State, 206 Tenn. 336, 333 S.W.2d 799; Huffman v. State, 200 Tenn. 487, 495, 292 S.W.2d 738; Clark v. State, 197 Tenn. 67, 270 S.W.2d 361. See also: 21 Am.Jur.2d., Criminal Law §226, p. 265. Conviction upon a charge not made or without evidence of guilt is a denial of due process of law. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654.

Accordingly, the judgment of the trial court is reversed and this case is remanded thereto for further proceedings not inconsistent with this opinion.

W. Wayne Oliver
Judge

Concur:

Mark A. Walker
Presiding Judge

(SEE DISSENTING OPINION)
Charles H. O'Brien
Judge

Office of CLERK OF THE COURT OF CRIMINAL APPEALS
FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

RAMSEY LEATHERS, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, plete copy of the OPINION

Court, pronounced at its February term, 19 75, in case of

JESSIE D. McDONALD vs. STATE OF TENNESSEE

ers of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the

STATE of Tennessee, Petitioner,
v.
Jessie D. McDONALD, Respondent.

Supreme Court of Tennessee.

Jan. 19, 1976.

Rehearing Denied March 15, 1976.

Certiorari Denied April 26, 1976.

See 96 S.Ct. 1733.

Defendant was convicted in Criminal Court, Davidson County, Allen R. Cornelius, Jr., J., of false pretense. The Court of Criminal Appeals, reversed and certiorari was granted. The Supreme Court, Henry, J., held that the reliance of the victim is not an essential element of the offense "false pretense"; the offense is committed when the person to whom the false representation is made or the false token or counterfeit letter is offered relies upon the same to the ultimate detriment of the victim.

Judgment of trial court reinstated; that of Court of Criminal Appeals reversed.

1. False Pretenses ⇐10

Defendant, who obtained from county court clerk a clear and unencumbered title to automobile which was encumbered by a lien in favor of credit union by falsely and fraudulently representing that lien in favor of credit union had been released, was guilty of false pretense even if the victim did not rely upon the false representation. T.C.A. § 39-1901.

2. Criminal Law ⇐13.1(1)

Absolute precision in statute creating a criminal offense is not required; both common-law concept and constitutional process are satisfied when the statute informs all citizens as to what the State commands or forbids, and outlines the proscribed conduct with reasonable certainty.

3. Criminal Law ⇐13.1(1)

Terminology of criminal statute must give fair warning and must not be a trap for the innocent.

4. Criminal Law ⇐13.1(2)

False pretense statute outlines the proscribed conduct with reasonable certainty and gives fair warning. T.C.A. § 39-1901.

5. False Pretenses ⇐10

Reliance of the victim is not an essential element of the offense "false pretense" as defined in statute. T.C.A. § 39-1901.

6. False Pretenses ⇐10

False pretense statute is satisfied when the person to whom the false representation is made or the false token or counterfeit letter is offered relies upon the same to the ultimate detriment of the victim.

Milton P. Rice, Atty. Gen., William C. Koch, Jr., Asst. Atty. Gen., Nashville, for petitioner.

Jessie D. McDonald, pro se.

OPINION

HENRY, Justice.

We granted certiorari in this case to consider the single question of whether the reliance of the victim upon the false representation or pretense is necessary to sustain a conviction under Section 39-1901, T.C.A.[1]

We respond in the negative.

The words "false pretense" include all cases of pretended buying, borrowing, or hiring, bailment or deposit, and all cases of pretended ownership, where the person obtaining possession intended, at the time he received the property, feloniously to steal the same.

1. Section 39-1901 T.C.A. reads as follows:
39-1901. *False pretense.*—Any person, who, by any false pretense, or by any false token or counterfeit letter, with intent to defraud another, obtains from any person any personal property, or the signature of any person to any written instrument, the false making of which is forgery, shall, on conviction, be punished as in case of larceny.

I.

[1] Respondent was convicted upon an indictment which charged that he obtained from the county court clerk of Davidson County a clear and unencumbered title to a 1972 Ford LTD automobile which was encumbered by a lien in favor of Purity Dairies Employees Federal Credit Union, by falsely and fraudulently representing that a lien in favor of the credit union upon the automobile had been released and that it was free of encumbrances.

Respondent's approach was incredibly ingenious and remarkably bold.

Under the name of Jessie D. McDonald, he applied for and received a loan from the credit union to finance the purchase of a new automobile. Upon closing he executed a note and security agreement. He then volunteered to take the documents downtown and apply for a certificate of title. This was the triggering false representation, and the credit union with astonishing credulity and naivete relied upon him.

The next day he presented himself at the County Court Clerk's Office, using the name of Jessie McDonald, II, and applied for a title certificate. In so doing he falsely and fraudulently gave his own address as the address of the credit union, with the result that the title was issued and mailed to the lien holder at respondent's address.

Subsequently, using the name of Jessie D. McDonald, II, he assigned the title to his father, Jessie D. McDonald, Sr. Two days thereafter, posing as Jessie D. McDonald, Sr. he presented himself at the County Court Clerk's Office and applied for a certificate of title. The certificate tendered to the clerk indicated that the vehicle had been sold to McDonald, Sr. and contained a notarized release of the lien, with the credit union's name stamped thereon. He made affidavit that the vehicle was free of encumbrances.

In order to avoid the sales tax, he executed an affidavit that the automobile was a gift from his son. In connection with the transfer of the license plates, he swore that Jessie D. McDonald and Jessie D. McDonald, Sr. were one and the same. This was true; all McDonalds were one and the same.

Subsequent to this he received a notice that payment was due and he wrote the credit union advising that his loan had been paid in full; that there was no lien on the automobile, and that he was no longer the owner.

This prosecution ensued.

II.

Our review has been limited to the narrow issue of whether the victim must rely upon the false representation to support a conviction under the statute.

Section 39-1901, T.C.A. originated in Chapter 23 of the Public Acts of 1829 and Chapter 48 of the Public Acts of 1841-1842.

To our knowledge the first case construing these enactments is *McCorkle v. State*, 41 Tenn. 333 (1860). The Court declared the ingredients of the offense to be "obtaining the goods by false pretences and with an intent to defraud." The Court made this significant comment:

> As was said by Lord Kenyon (3 Term Rep. 103), the statute creating this offense describes it in terms extremely general. It seems difficult to draw the line, and to say to what cases it shall extend; and therefore we must see whether each particular case, as it arises, comes within it. 41 Tenn. at 336, 337.

[2-4] This conclusion reached more than a century ago continues to be valid. Not even a statute creating a criminal offense can spell out the specifics with mathematical certainty and, indeed, absolute precision is not required. Both common law concept and constitutional due process are satisfied when the statute informs all citizens as to what the state commands or forbids, and outlines the proscribed conduct with reasonable certainty. Its terminology must give fair warning, *Raley v. Ohio*, 360 U.S. 423, 79

S.Ct. 1257, 3 L.Ed.2d 1344 (1959), and must not be a trap for the innocent. *United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952). Section 39–1901 meets these standards.

A significant recent case is *Beck v. State*, 203 Tenn. 671, 315 S.W.2d 254 (1958). There, the Court adopted the holding of *State v. Morgan*, 109 Tenn. 157, 69 S.W. 970 (1902) and reiterated that the elements of the offense of violating the statute on false pretenses are: "(1) the pretense, (2) the falsity of the same, (3) the felonious and fraudulent intent, (4) the description of the property, and (5) *the reliance of the victim* upon the representations." (Emphasis supplied). The state in brief correctly characterizes the fifth element (reliance) as dictum in view of the fact that the false representation was made by Beck directly to the victim, hence the Court was under no necessity to address this requirement. In *Morgan*, the Court, in passing upon the validity of the indictment, merely analyzed it under five headings, one of them being "reliance" of the victim. Again the Court did not directly address the necessity for reliance.

The latest pertinent pronouncement of this Court was in *Mullican v. State*, 210 Tenn. 505, 360 S.W.2d 35 (1962) wherein the Court enumerated the elements of the offense thusly:

> [T]he false representation made must be representation of a past or existing fact, whether it be by oral or written words or conduct, which is calculated to deceive, or intended to deceive, and does as a matter of fact deceive; and by means of which, by doing these things, the person who does it obtains something of value from the person injured without proper compensation. (citations omitted).
>
> . . . under this statute the intent to defraud is the gravamen or an essential element in the crime. 210 Tenn. at 511, 360 S.W.2d at 38.

Dicta aside, the courts of this state have never held that the reliance of the victim is an element of the offense proscribed in Section 39–1901. Indeed, there is an analogous line of cases to the contrary. As a matter of fact, *Beck, supra*, correctly treats as settled law that it is not necessary that the representation must be calculated to deceive a man of ordinary prudence and caution. As pointed out in 12 *Vanderbilt L.Rev.*, pages 1134, 1135 in commenting on this phase of *Beck*, "Regardless of its merits or demerits in tort law, it would seem strange indeed to let the necessity of such reliance remain in the law of crimes to work a kind of estoppel against victims of false pretenses who may be deficient in astuteness and vigilance in favor of the perpetrators thereof . . . ." Would it not be equally strange to establish as a part of our law that the reliance of the victim is an essential element of the offense of obtaining money or property under false pretenses?

It is obvious that there must be reliance by someone, but in this modern day and age when fraud and deceit are practiced with sophistication and ingenuity a narrow construction such as this would be tantamount to a judicial conference of the proverbial "license to steal."

[5, 6] We hold that the reliance of the victim is not an essential element of the offense "false pretense" as defined in Section 39–1901 T.C.A. We hold that our statute is satisfied, in this respect, when the person to whom the false representation is made or the false token or counterfeit letter is offered, relies upon the same to the ultimate detriment of the victim.

An excellent line of reasoning is contained in *Commonwealth v. Johnson*, 167 Ky. 727, 181 S.W. 368 (1916) [According to our own case of *State v. Higgins*, 148 Tenn. 609, 256 S.W. 875 (1923) the Kentucky statute is markedly similar to ours] The Court said:

> The statute does not require that the false statement should be made to any particular person, or that it should be with the intention of committing a fraud upon the person to whom the false statement was made. The offense is committed when the false statement is made, with the intention to commit a fraud, and money or property is thereby obtained.
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> . . . . . .
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> The purpose of the statute is to punish the perpetrators of fraud committed through any false pretense. The gist of the offense is the successful misrepresentation, *regardless of the person to whom it was made*. (Emphasis supplied). 181 S.W. at 370.

The judgment of the trial court is reinstated; that of the Court of Criminal Appeals is

Reversed.

FONES, C. J., and COOPER, BROCK and HARBISON, JJ., concur.

OPINION ON PETITION TO REHEAR AND MOTIONS

HENRY, Justice.

The petition to rehear is respectfully overruled.

The motion to set aside the conviction is respectfully denied.

The motion for a stay pending application to the Supreme Court of the United States for certiorari is granted, providing the petition is timely filed. Pending the filing and disposition of said petition, the judgment of this Court will be stayed and defendant may remain upon his present bond.

Timothy A. CRAVEN, Plaintiff,
v.
Fred LAWSON, Defendant.
Supreme Court of Tennessee.
Jan. 26, 1976.

Action was brought against driver and owner of automobile for personal injuries sustained by a passenger in an accident. After settlement of the action against the driver, the Circuit Court, Knox County, Chester R. Mahood, J., rendered summary judgment for the owner and the Court of Appeals affirmed. On certiorari, the Supreme Court, Fones, C. J., held that the rule requiring that a motion for summary judgment be served at least 30 days prior to the hearing thereon was mandatory, not discretionary; that the trial judge erred in failing to grant passenger's motion to amend his complaint against the owner to allege negligent entrustment and other independent acts of negligence; and that the Uniform Contributions Among Tort Feasors Act did not change the rule that the derivative liability of a master or principal is extinguished by covenant not to sue the servant or agent.

Reversed and remanded.

1. Judgment ⇐183

Rule requiring that motion for summary judgment be served at least 30 days prior to hearing thereon was mandatory, not discretionary. Rules of Civil Procedure, rule 56.03.

2. Appeal and Error ⇐1177(2)

Where there is slightest possibility that party opposing motion for summary judgment has been denied opportunity to file affidavits, take discovery depositions or amend, by disposition of motion for summary judgment without 30-day interval following filing of motion, it will be necessary to remand case to cure such error. Rules of Civil Procedure, rule 56.03.